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IN THE HIGH COURT OF JUSTICE CO/11949/2008

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN

on the application of

MAYA EVANS

Claimant

- and -

SECRETARY OF STATE FOR DEFENCE

Defendant

WITNESS STATEMENT OF [REDACTED]

I, [REDACTED] of Ministry of Defence, Main Building, Whitehall, London, WILL SAY as follows:

1. I am the Head of Legal Policy within the Operations Directorate in the Ministry of Defence, which is a Senior Civil Servant and 1* post. I have held this particular post for 15 months. Since I joined the MoD in 1978 I have held a number of posts covering many aspects of MOD business. In my current role I am responsible for central Departmental policy [REDACTED] and legal issues as they affect military operations.
2. I have been asked to make this statement to explain the circumstances surrounding the transfer of one Insurgent to the NDS facility at Kabul on 15 January 2010, notwithstanding the existing moratorium on transfers to this facility. I also explain the assessment of risk which was undertaken at the time of transfer, what safeguards were put in place to mitigate the risks, and issues resulting from this transfer.
3. Insofar as the matters to which I shall refer in this statement are within my own knowledge, they are true; insofar as they are not within my own knowledge they are based on documents I have seen or are derived from the persons or sources I identify, and I believe them to be true.

Transfer of detainee on 15 January 2010 to Kabul

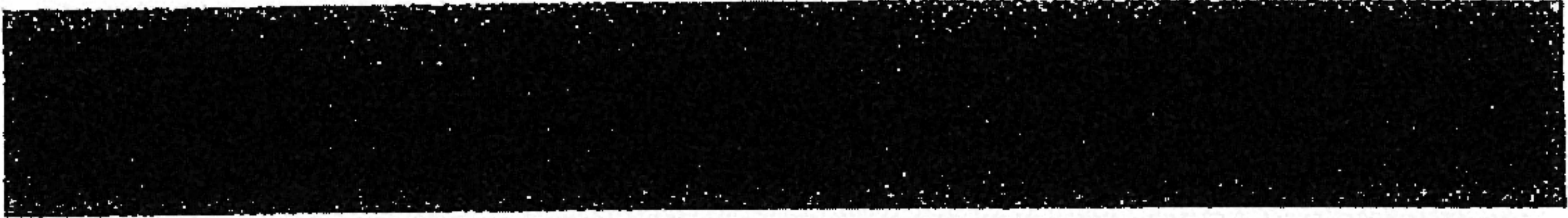
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4. The fact of this transfer was first explained in a letter from the Treasury Solicitor to the court dated 25 January 2010. Given the highly classified nature of the information, it was not possible to set out much information in open correspondence, so I now set out further information in this closed witness statement.
5. As has been explained in evidence already before the court, the Defendant imposed a moratorium on transfers of UK captured detainees to Kabul in December 2008, in response to problems gaining access to the facility. This moratorium remains in place. However, following very careful consideration, the Foreign Secretary and the Minister of State for the Armed Forces decided to make an exception to this moratorium in respect of one UK captured detainee who was transferred on 15 January 2010 to an arm of the NDS in Kabul (namely, Detachment 90, the counter-terrorist detachment of the NDS).
6. The detainee is a senior figure in the insurgency, involved in attacks on UK and Coalition forces and Afghan civilians. [REDACTED]
7. As the court will be aware, UK Armed Forces now ordinarily transfer all UK captured detainees to the NDS in Lashkar Gah, Helmand Province. However, I assessed, after receiving reports from UK personnel in theatre and after consultation with other MOD and FCO officials that this was not a viable option in respect of this important insurgent because of the influence he would be able to bring to bear in that region to prevent any prosecution proceeding and to secure his release. Not only would this have prevented the Afghan authorities from prosecuting a high value insurgent, but it would undermine the status and authority of the rule of law in the eyes of the population of Helmand, putting at risk progress on one of the key elements of the international community's efforts to support the democratically elected government of Afghanistan, as mandated by UN Security Council Resolutions.
8. First, in view of his Taliban connections and status in Helmand province, there was a strong possibility that he would have been able to secure his early release by unlawful means. [REDACTED]

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9. A secondary consideration was that there was, we believed, a far greater prospect of this detainee being successfully prosecuted in Kabul, the Afghan centre of counter-terrorism expertise, than if he was transferred to Lashkar Gah where counter-terrorism skills and resources are not readily available.
 10. We further assessed that upon release there was a real likelihood that he would return immediately to activities within the insurgency which threaten directly the lives of Afghan civilians and UK and Coalition forces and undermine the purpose of the ISAF mission which is, inter alia, to assist in the maintenance of security in Afghanistan.
 11. We therefore considered alternative solutions, including release. We concluded that release was an option to be avoided as far as possible because the intelligence assessment was he would have returned immediately to actively supporting attacks in Helmand. As we do not have a power to detain indefinitely, transfer to the Afghan authorities was the only viable alternative if he was to remain in custody and transfer to the NDS Kabul was the only viable alternative if the Afghan judicial process was to work effectively with this insurgent, as Kabul was the one location where the influence he would be able to wield could be minimised and where the Afghan authorities had the necessary counter-terrorism skills.
 12. Nevertheless, however weighty our concerns about his release, we were equally conscious that we could not transfer this insurgent to Kabul if there were substantial grounds for believing that there was a real risk (assessed at the time of transfer) that he would suffer torture or serious mistreatment. The reason we would not have done so, leaving aside the legal issues which are in dispute in this case, is that a transfer in such circumstances would have been contrary to our policy.
 13. Accordingly, we sought to assess the risk of this detainee being subjected to torture or serious mistreatment upon transfer to the NDS in Kabul. Although the NDS had requested that the insurgent be transferred to the NDS's counter-terrorist detachment (Det.90), which has not been implicated in any allegations of mistreatment, we considered that it was very probable, if their investigation was successful, that he would subsequently be transferred to NDS Dept 17 (the investigations and pre-trial detentions division). We therefore based our

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assessment of the risk of this detainee being seriously mistreated or tortured on an assumption that he would be detained by the NDS in Dept. 17 as well as initially in Det. 90.

14. We were mindful of the current moratorium in respect of transfers to the NDS in Kabul. In particular, we took into account the reason it had initially been imposed in December 2008 that is, because we had been concerned about difficulties we were then having obtaining access to detainees held by NDS Dept 17 in Kabul. We also took into account the fact that the moratorium has been maintained in force following the resolution of those access problems because a number of subsequent allegations of mistreatment by NDS Dept 17 have been made by detainees, in respect of which investigations are ongoing. We also took into account the fact that the named perpetrator in the alleged mistreatment at Dept. 17 has been dismissed, we believe as a result of his behaviour.
15. In anticipation of a possible transfer, representations were made by HM Ambassador to Afghanistan to NDS Director General Dr Saleh, by letter and in person, underlining the imperative need to adhere to the provisions of the Memorandum of Understanding (MOU) were this detainee to be transferred (and generally). In response, Dr Saleh gave specific reassurances that this detainee would be treated humanely, and that UK officials would be given full access to him in accordance with the terms of the MOU between the UK and Afghan Governments. This provided reassurance that the earlier concerns over limitations to access and the absence of completed investigations into allegations of mistreatment were mitigated.
16. Very careful consideration was given by me and my colleagues, both in the MOD and the FCO, and then by Ministers, to whether this Insurgent would be at real risk of serious mistreatment if transferred to the NDS in Kabul. Taking into account the matters set out above, the Foreign Secretary and the Minister for Armed Forces each, independently, decided that there was not such a risk and that an exception to the moratorium on transfer to the NDS in Kabul could accordingly be made in this case.
17. As I have stated, the transfer took place on 15 January and the British Embassy staff in Kabul (BEK) made contact with the NDS Liaison Officer on 20 January requesting permission to visit soon thereafter. Unfortunately, the chaotic and tragic events following the various suicide bomb attacks on Kabul on Monday 18 January made immediate contact with the NDS very difficult as many of them were deployed over the next few days to investigate the incidents.

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18. After this initial delay, BEK staff experienced considerable difficulty with gaining access to the insurgent despite repeated attempts to arrange a visit. I have annexed to this statement all the emails setting out the attempts to arrange a visit. In summary, BEK staff contacted the NDS on an almost daily basis and as can be seen from the email from Gemma Paolucci [4 February 18:20] on many of these days there were several attempts. There were 2 key factors which prevented these visits: the first being the absence of Dr Saleh (the Director General of the NDS) who was out of country for several days and from whom it transpired personal permission was required to gain access to a high value detainee in Kabul. The second factor which caused delay was the reluctance of Dr Saleh to agree to a visit during the investigation process. He considered that such a visit would disrupt the carefully controlled environment which had been developed to facilitate the questioning process, which could have an adverse impact on the NDS investigation into his suspected serious insurgent activities. Although we continued to press for access during this period, we recognise the very real need to limit contact with others whilst building a relationship with a detainee, particularly given this individual's pattern of behaviour whilst in our custody, where he sought to obfuscate and deceive.
19. On 27 January, BEK were informed that on 20 January the detainee had been transferred to NDS Dept 17. So the visit, once arranged on 14 February, took place at this location. During that visit, the report of which is annexed, the detainee alleged that he was mistreated in both Det. 90 where he was originally transferred and again in Dept. 17 where he remains to this day.
20. The detainee showed the visit party (comprising a member of the BEK staff and a Royal Military Police Staff Sergeant) some of the alleged injuries which he claimed were made as a result of being beaten several times with steel rods to the areas of his legs and feet which he claims left him unable to stand afterwards. Photographs of some of the alleged injuries are also annexed. He withheld permission for this allegation to be reported to NDS or other Afghan authorities. He gave permission for ICRC and AIHRC to be notified of the general details anonymously but not within the next three months. He alleges that he fears reprisals.
21. A further visit took place on 1 March. The detainee alleged that between visits he had been subjected to further abuse although he declined to show the alleged injuries to any of the visit party. He continued to refuse the UK permission to raise these allegations with Afghan Authorities. He has now revoked permission to raise these allegations with the ICRC and AIHRC as well. The reports and photographs are attached.

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22. As a result of the allegations made at the 1st March visit, an urgent video conference between London and Kabul was arranged, which I attended, hosted by the FCO Afghan group at 1600 GMT (2100 in Kabul) that same day. In attendance in the UK were myself, legal and policy colleagues from the FCO and a MOD. In attendance in Kabul were an Embassy representative, the Force Provost Marshal and a Military Policeman who had visited the detainee. I took the opportunity to question the Force Provost Marshall on her initial view of the condition of the detainee and the substance of his allegations. She expressed no concerns about his general condition, so far as this could be judged visually.
23. We discussed the photographs that were taken of the detainee's alleged injuries, including a bruise on his arm which was described to me as fading and approximately the size of a 50 pence piece (this photograph is attached as an exhibit to this statement). Neither the FPM nor the WO who had attended the visit expressed to me serious concern about the severity of any of physical injuries they had been able to see or any degeneration in the general condition of the detainee since their initial visit two weeks prior. We also spoke about the withdrawal of consent by the detainee and how we should further manage this case.
24. UK officials are considering how to address these allegations. We have not, in the absence of consent from the detainee, passed information regarding his allegations of mistreatment to enable the Afghan authorities, the ICRC or the AIHRC to investigate. As this detainee is the only UK captured insurgent currently in the NDS facility in Kabul, even raising the issue in general terms would identify him, contrary to his express wishes. Issues we are considering will address, inter alia, whether the inclusion of a medical doctor in the next visit party would alert the NDS to the possibility that allegations had been made.
25. The moratorium on the transfer of detainees to the NDS in Kabul remains otherwise in force. No detainee will be transferred to the NDS in Kabul other than, as in this case, following a decision by Ministers. In the event that the situation arises again where UK Armed Forces capture a detainee who cannot effectively be detained and prosecuted other than in Kabul, a fresh decision would be made as to the risk of the detainee being subjected to torture or serious mistreatment. Any such reconsideration would, of course, take fully into account the problems that BEK initially encountered securing access to this detainee, as well as his allegations, and any assessment of those allegations that it may, by that stage, have been possible to make. It would not be appropriate for me to pre-empt the assessment that would have to take place in such circumstances. But I wish to make it clear that we will not transfer any detainee to the Afghan authorities if we assess that there is a real risk at the time of transfer that he will be subjected to torture or serious mistreatment.

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Statement of Truth

I believe the contents of this statement are true.

Signed

Dated

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